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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID ANTHONY RODRIGUEZ,

Defendant and Appellant.

D056481

(Super. Ct. No. RIF125410)

APPEAL from a judgment of the Superior Court of Riverside County, Jean P. Leonard, Judge. Affirmed as modified.

A jury convicted appellant David Rodriguez of one count of attempted murder (Pen. Code,<sup>1</sup> § 664/187, subd. (a), count 1), two counts of shooting at an occupied vehicle (§ 246, counts 2-3), two counts of being a felon in possession of a firearm (§ 12021, subd. (a), counts 4 and 6), and two counts of actively participating in a criminal street gang (§ 186.22, subd. (a), counts 5 and 7). The jury also found true the following

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

allegations: that Rodriguez personally discharged a firearm causing great bodily injury in connection with counts 1 and 2 (§ 12022.53, subd. (d)); that he committed the offenses alleged in counts 1, 2, 3 and 6 for the benefit of a criminal street gang (§ 186.22, subd. (b)), and that he committed the offenses alleged in counts 1 and 2 because of the victim's race, color, nationality, country of origin, ancestry or sexual orientation (§§ 422.75, subd. (a), 422.55, subd. (a)(3) & (4)). In a bifurcated proceeding, the court found true the allegations that Rodriguez had been convicted of a prior serious felony (§ 667, subd. (a)) and had a prior conviction under the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The court sentenced Rodriguez to a determinate prison term of 19 years and a consecutive indeterminate prison term of 88 years to life.

Rodriguez asserts (1) the court improperly consolidated for trial two separate cases against him; (2) his admissions to a police officer should have been excluded; (3) the court improperly permitted a gang expert to testify concerning Rodriguez's prior crimes; (4) the court improperly admitted into evidence a letter purportedly written by Rodriguez; (5) the evidence was insufficient to support conviction on the substantive gang offenses and the gang enhancements; (6) the evidence was insufficient to support the hate crime enhancement; (6) there was instructional error; and (7) there were sentencing errors.

## FACTS

### A. The August 6, 2005, Gas Station Shooting (Counts 1-5)

On August 6, 2005, Jose Martinez (Jose) was driving his grey Silverado truck to buy gas. While en route, Jose was flagged down by Rodriguez and Rodriguez's younger brother (Felix), and Rodriguez asked Jose for a ride. Jose, who had met Rodriguez while

they were both in county jail, agreed and Rodriguez got into the front passenger seat while Felix got into the back seat.

When Jose pulled into the gas station, Maria Martinez (Maria) was pumping gas into her car while her husband (Adrian) went inside the station to pay. Maria's brother was also at the station, parked behind her. When Jose began putting gas in his truck, Rodriguez got out and approached Maria's brother and appeared to be arguing with him. Maria told Rodriguez she didn't want any trouble, and Felix told Rodriguez to get back in the truck. Rodriguez then returned to Jose's truck and got into the front passenger's seat.

Shortly thereafter, Jose heard four or five gunshots. Maria and Adrian also heard the shots and saw someone firing a handgun through the window from the front passenger seat of Jose's truck, where Rodriguez was seated. Maria looked in the direction the shooter was pointing the gun, saw a Black man falling out the door of a vehicle leaving the gas station, and Maria decided to leave.

The wounded man was Edward Nwajagu. Edward was with a group of people in Moses Ike's car, which had stopped at the gas station. The occupants of Moses's car were of Black Nigerian ancestry. While they were stopped, Edward and another passenger got out while Moses filled the vehicle with gas. When Moses finished, everyone got back into the car and Moses began to drive away. As their car approached the street, his passengers heard loud popping noises. Passengers Esther Ony and Edward thought the noise might be coming from their tires, so Moses stopped and Edward opened his door at the rear left of the car and leaned out to look at the tires. As Edward leaned out to look, Esther heard more popping noises. Another passenger told Moses, "we're being shot at

. . . get out of here." Esther ducked down and told Edward to close the door, but Edward appeared to be slumped forward in his seat. As the car turned into the street, Edward fell to the ground out of the open door. Edward suffered a gunshot wound to the head and, one year after the shooting, remained comatose and unresponsive.

At the time the shots were fired, Roger Barrett was driving his truck past the gas station. As he drove by, he heard three pops and felt something strike the side of his truck. He drove a little further before stopping to see what had happened. He found, in the outside driver's door of the truck, what he believed to be a bullet hole that had not been there previously.

Police recovered five spent .380 cartridge casings on the ground of the gas station. The location of the casings was consistent with the gun being fired from the area in which Jose's truck had been parked. No other casings were recovered.

After Jose heard the shots, he jumped into his truck to leave the gas station. Rodriguez, who was in the truck holding a dark colored handgun, said, "Let's go," and Jose drove to his (Jose's) house. After they arrived, Rodriguez asked Jose to drive Rodriguez and Felix to another location. Jose switched cars and drove Rodriguez to the location in Rubidoux to which Rodriguez directed him.<sup>2</sup>

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<sup>2</sup> A couple of days later, Jose found a dent on his truck he had not previously noticed. When police later impounded Jose's truck and inspected the dent, it was determined the dent was a bullet "graze" mark that appeared to have been caused by a bullet originating near the passenger door of the truck and traveling toward the front of the truck.

### B. The August 30, 2005, Shooting (Counts 6 and 7)

Riverside Police Sergeant Toussaint came to the hospital on September 1, 2005, to investigate an August 30, 2005, incident in which Rodriguez had suffered a gunshot wound. Rodriguez told Toussaint that he had been walking down the street when an unknown assailant shot him in the groin. However, Rodriguez described the injury as occurring when the bullet entered his scrotum, went through his inner left thigh, and exited on the outside of his thigh. Based on Rodriguez's description of the trajectory of the shot, Toussaint believed the wound was self-inflicted. When Toussaint asked him about this suspicion, Rodriguez stated he had accidentally shot himself while carrying a weapon in the front waistband of his pants.

Toussaint also reviewed the photographs of Rodriguez's wound and concluded the wound appeared to have been caused by a shot that entered Rodriguez's scrotum, proceeded through his inner left thigh, and exited on the outside of his thigh.

### C. Gang Expert Testimony

Two police officers—Toussaint and Detective Impola—provided expert testimony concerning gang culture, the "East Side Rivas" (a Hispanic gang in Riverside), and their opinions that Rodriguez was a member of East Side Rivas (ESR). Toussaint testified ESR was a gang operating in Riverside and had approximately 500 members. The primary activities of the gang were narcotics trafficking, violent assaults, and homicides. Toussaint testified to several "predicate acts" (§186.22, subd. (f)), including a conviction of an ESR member for the attempted murder of two Black males, and another conviction of a different ESR member for robbery and assault with a deadly weapon.

The "1200 Blocc Crips" is a Black gang operating in the same area as ESR, which included the gas station where the August 6, 2005, crimes occurred. The gangs are rivals and have been involved in a violent feud since 1991. The warfare between ESR and 1200 Blocc Crips evolved from gang-on-gang clashes into a broader racial vendetta in which ESR members would target individuals because of the color of their skin (believing the person could be a 1200 Blocc Crip) and 1200 Blocc Crips would target Hispanics for the same reason.

Impola and Toussaint stated, based on numerous facts, that Rodriguez was a member of ESR. First, Rodriguez had the letters "ESR" tattooed on his right arm; this type of tattoo was used to symbolize ESR membership, and someone wearing that tattoo who was not an ESR member would be subject to physical retaliation by ESR members. Second, Impola testified he had searched the jail cell belongings of a Mr. Yescas (an ESR member) and found a letter (the Yescas letter) signed by "Home Boy David" that Impola stated was written by Rodriguez. The letter contained numerous references suggesting the author was an ESR gang member.<sup>3</sup> Third, in 2002, police had documented a field contact report noting Rodriguez (accompanied by other ESR members) had been seen running from a location of a "shots fired" call. Fourth, during a 2003 search of

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<sup>3</sup> For example, the letter contained the phrase, "just kicking it like a [villain] snail killing," and the term "snail" is a derogatory term used by ESR members to refer to 1200 Blocc Crips. Also, Toussaint noted that if someone falsely claimed membership in ESR to an ESR gang member, the person making that claim would be open to being violently assaulted or killed. The letter also used the terms "Tiny Dukes," "ES 14" and "Primos," which are cliques within ESR. The number "12" in the date had been crossed out, which, in Impola's opinion, was the result of the rivalry with the 1200 Blocc Crips.

Rodriguez's house, Toussaint found a loaded handgun, narcotics, and ESR graffiti. Fifth, Rodriguez was convicted of assault with a deadly weapon because he stabbed a Black man in 2004, and an expert concluded this was gang related because it was a sudden and unprovoked attack.<sup>4</sup> When police searched Rodriguez's home following the stabbing incident, they again found paraphernalia and writings associated with ESR. Sixth, when police searched Rodriguez's home in connection with the 2005 gas station shooting, they found a letter from another gang member (in jail for an attempted murder involving Black male victims), a cartoon referring to "snails," and another cartoon modified to depict a cat flashing an ESR gang handsign.

Toussaint explained that, in the gang culture, the more violent the gang member behaves, the more respected he will be within the gang. Moreover, violence benefits the gang as a whole, because the reputation of the gang will be enhanced. When asked a hypothetical question based on facts identical to the August 5 shooting, Toussaint stated the shooting was for the benefit of the gang because it was consistent with their ongoing pattern of violence toward ESR's opponents, and would also be considered at the "direction of" the gang because it was carrying out orders from the Mexican Mafia. When asked a hypothetical question based on facts derived from his September 1 interview of Rodriguez concerning the August 30 shooting, Toussaint again stated the possession of a firearm was for the benefit of the gang because gang members arm

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<sup>4</sup> The defense, contesting this characterization, noted Felix (Rodriguez's brother) had claimed Rodriguez had come to his aid when Felix was surrounded and menaced by a large group of Black men.

themselves either to defend themselves and other gang members from rivals or to attack opponents in an opportunistic fashion should they happen upon them.

#### D. Defense Evidence

Rodriguez testified in his own defense. He was present at the gas station on August 6 but neither he nor his brother fired a gun. Instead, when they heard the shots, they drove away with Jose.

He admitted that he was armed with a firearm on August 30, but claimed he found it while walking home. He spotted an abandoned car with the windows down and the stereo ripped out and, when he looked inside the car, he saw something wrapped in a towel, which turned out to be a revolver. He decided to keep it, but as he slipped it into his pocket, the hammer caught on his pocket and the gun discharged, wounding him. When he was interviewed by the officer in the hospital, he initially lied about what had happened because he feared going to jail.

Rodriguez admitted he was involved in the 2004 fight that resulted in his guilty plea to a charge of assault with a deadly weapon, but claimed that he was acting to defend his brother. Rodriguez claimed the incident was instigated by the victim, who approached Felix and made remarks that upset Rodriguez. Rodriguez tried to intervene by pushing the man away, but the man reacted by swinging at him. Rodriguez hit back and, when he feared the man and the man's friends were about to jump him and his brother, pulled the knife from his pocket. When the man took another swing, Rodriguez defended himself with the hand holding the knife. He later learned he had cut the man.

Rodriguez denied he was an ESR member. The tattoo on his arm, which says, "In loving memory of Chato ESR," is in memory of his uncle Chato. Rodriguez did not write the Yescas letter. Rodriguez has never intentionally harmed any Black person because of his or her race.

Two of Rodriguez's neighbors testified he harbored no animus toward African-Americans. Rodriguez's mother confirmed he had no hatred toward African-Americans. She also testified Rodriguez was not a member of ESR, and that Rodriguez got his tattoo in memoriam to his uncle Chato, who was an ESR member before he died.

## ANALYSIS

### A. Joinder of the Charges

Rodriguez contends it was error to consolidate for trial the charges stemming from the August 6 shooting with the charges stemming from the August 30 incident because (1) the charges stemming from the two incidents did not qualify for joinder, and (2) even if the charges did qualify for joinder, it was an abuse of discretion to deny his motion for severance.

### *Applicable Law*

Joinder and severance of different criminal charges are governed by section 954 (*People v. Maury* (2003) 30 Cal.4th 342, 391), which permits the joinder for trial of different offenses under certain circumstances: "An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts, . . . [provided] that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts

set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." (§ 954.)

The joinder of related charges, " 'whether in a single accusatory pleading or by consolidation of several accusatory pleadings, ordinarily avoids needless harassment of the defendant and the waste of public funds which may result if the same general facts were to be tried in two or more separate trials [citation], and in several respects separate trials would result in the same factual issues being presented in both trials,' " and therefore the law prefers consolidation of charges. (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.) If the requirements for joinder under section 954 are met, a defendant must then make "a clear showing of potential prejudice" arising from the consolidation of joined counts to establish error in the denial of a motion to sever. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315 (*Bradford*).) This court reviews a trial court's ruling on a motion to sever for an abuse of discretion. (*Ibid.*)

" ' "The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial." [Citation.] Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges;

and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.' " (*Bradford, supra*, 15 Cal.4th at p. 1315.)

These criteria "are not equally significant." (*Bradford, supra*, 15 Cal.4th at p. 1315.) " '[T]he first step in assessing whether a combined trial [would have been] prejudicial is to determine whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others.' " (*Id.*, at pp. 1315-1316.) If evidence on each of the joined charges would have been admissible in separate trials on the charges, the likelihood of prejudice in the denial of a motion to sever is dispelled. (*People v. Maury, supra*, 30 Cal.4th at p. 393.)

#### *The Charges Were Properly Joinable*

The charges in case number RIF125410, which arose from the August 6 shooting, included a count of being a felon in possession of a firearm (§ 12021, subd. (a)), and a count of actively participating in a criminal street gang (§ 186.22, subd. (a)). The charges in case number RIF126849, which arose from the August 30 shooting, also included a count of being a felon in possession of a firearm (§ 12021, subd. (a)), and a count of actively participating in a criminal street gang (§ 186.22, subd. (a)). The charges were of the "same class" and were properly joinable because they were identical. (*People v. Soper* (2009) 45 Cal.4th 759, 771.)

Rodriguez argues the latter charges were not of the "same class" as the former charges because the latter did not involve the common attribute of assaultive behavior. Although the courts may examine common factual attributes to determine whether charged offenses involving *different* statutory offenses are of the "same class" (see, e.g.,

*People v. Moore* (1986) 185 Cal.App.3d 1005, 1012-1013), Rodriguez cites no authority suggesting a similar inquiry is required when the *same* statutory offenses are charged.

We conclude the charges were properly joinable for trial.

*The Trial Court did Not Abuse Its Discretion in Denying Severance*

Rodriguez alternatively asserts that, even if the charges qualified for joinder, the court abused its discretion by denying his motion to sever. The parties agree that, if evidence of the August 30 offenses would have been cross-admissible at a separate trial of the August 6 offenses, any inference of prejudice from a consolidated trial of the offenses is dispelled. (*People v. Carter* (2005) 36 Cal.4th 1114, 1154.) The trial court denied the severance motion based in large part on its conclusion that evidence of Rodriguez's possession of the gun on August 30 would have been relevant and cross-admissible on the gang issues raised in both sets of charges.

Although "[e]vidence of crimes committed by a defendant other than those charged is inadmissible to prove criminal disposition or a poor character[,] . . . ' . . . evidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. [Citation.] Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. . . . ' " (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123 (*Lenart*)).

"To be relevant to prove identity, the uncharged crime must be highly similar to the charged offenses, while a lesser degree of similarity is required to establish relevance to prove common design or plan, and the least similarity is required to establish relevance to prove intent." (*Lenart, supra*, 32 Cal.4th at p. 1123.) " '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act. . . .' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." ' " (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*), superseded by statute on other grounds as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505.) In addition, evidence of an uncharged crime is admissible only if it has "substantial probative value that is not greatly outweighed by the potential that undue prejudice will result from admitting the evidence." (*Lenart, supra*, 32 Cal.4th at p. 1123.)

" 'On appeal, the trial court's determination of th[e] issue [of the admissibility of other uncharged crimes], being essentially a determination of relevance, is reviewed for abuse of discretion.' " (*Lenart, supra*, 32 Cal.4th at p. 1123.) We conclude the trial court's ruling was not an abuse of discretion. The gang expert testified that it is common for gang members to arm themselves both for defensive purposes (against retaliation by rival gangs) and for offensive purposes (to attack rival gang members if the opportunity presents itself). The fact Rodriguez was strolling the streets with a loaded pistol just

weeks after an incident that the prosecution alleged was a by-product of the ESR-Crips warfare was probative (when considered with other evidence of Rodriguez's association with ESR) of whether he was an active participant in ESR and could support the inference by the jury that, if it found Rodriguez was the shooter on August 6, the shooting was for the benefit of ESR. (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1211-1212 [defendant's prior involvement in uncharged gang-related attack admissible to show that defendant's motive and intent in later attack was also gang-related].) We conclude the trial court's ruling—that the evidence of Rodriguez's conduct on August 30, 2005, was relevant to and cross-admissible on the issues regarding Rodriguez's conduct on August 6, 2005—was not an abuse of discretion.

*Joinder of the Charges Did Not Result in a Denial of Due Process*

Rodriguez appears to assert that, even assuming the cross-admissibility ruling was not an abuse of the trial court's discretion, the trial court's denial of his motion to sever nevertheless produced prejudice amounting to a denial of due process. " '[E]rror involving misjoinder "affects substantial rights" and requires reversal . . . [if it] results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict." ' " (*People v. Grant* (2003) 113 Cal.App.4th 579, 587.) "In other words, the defendant must demonstrate a reasonable probability that the joinder affected the jury's verdicts." (*Id.* at p. 588.)

Because the evidence as to each shooting was cross-admissible and was relevant to establishing his intent, Rodriguez has not established joinder of counts rose to the level of a constitutional violation. (See *People v. Sapp* (2003) 31 Cal.4th 240, 259-260 ["[h]aving

concluded that defendant suffered no prejudice from the joint trial of the three murder counts, we also reject his contention that the joint trial violated his due process rights"], citing *United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8 ["[i]mproper joinder does not, in itself, violate the Constitution [but] [r]ather . . . rise[s] to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial"].) Moreover, there was no prejudicial "spillover" effect because neither set of charges involved particularly weak evidence: Rodriguez's admissions (coupled with the evidence of his gang affiliation) provided strong evidence as to the August 30 counts, and the eyewitness testimony of Maria, Adrian and Jose establishing Rodriguez as the August 6th shooter provided strong evidence as to the August 6 counts. Furthermore, the consolidation did not involve unusually inflammatory charges likely to infect deliberations: the jury's verdicts on the August 6 counts were unlikely to have been infected by the image of Rodriguez painted by the relatively innocuous August 30 counts, and the jury's verdict on the August 30 counts were unlikely to have been affected because Rodriguez admitted the core conduct (possession of the firearm) that was the foundation for those counts. We conclude the trial court did not abuse its discretion in concluding the charges should be tried together, and that joinder did not offend Rodriguez's right to a fair trial on either set of counts.

#### B. Admission of Rodriguez's Hospital Statement

Rodriguez argues the trial court erred by admitting his statements to Toussaint, made while Rodriguez was hospitalized, that his gunshot wound was self-inflicted.

Rodriguez asserts the admission should have been suppressed because it was obtained in violation of *Miranda*.<sup>5</sup>

### *Factual and Procedural Background*

The trial court held a hearing, outside the presence of the jury, pursuant to Evidence Code section 402, to evaluate the admissibility of Rodriguez's statements (made to Toussaint on September 1, 2005) concerning the wound Rodriguez suffered on August 30, 2005. The defense contended the admissions were inadmissible because they were the product of a custodial interrogation not preceded by a *Miranda* warning.

At the section 402 hearing, Toussaint testified he went to interview Rodriguez because he believed Rodriguez had been the victim of a crime and Toussaint was investigating to determine who shot him. When Toussaint went to the facility where Rodriguez was being held, which was a jail ward at a local hospital, he knew Rodriguez was being held there because he had allegedly violated a term of his probation. However, Toussaint did not know the nature of the underlying conviction for which Rodriguez was on probation. Rodriguez initially claimed he had been shot in the testicles but had not seen the shooter. When he described the trajectory of the shot, however, Toussaint realized the shooter would have been standing right next to Rodriguez. Toussaint began to suspect the wound instead occurred because Rodriguez had a gun in his waistband when it discharged, and he asked Rodriguez if that had occurred. Rodriguez then conceded that was what had happened.

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<sup>5</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

The court concluded the questioning was a "general, on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process" rather than a custodial interrogation for which *Miranda* warnings are required, and denied the motion to suppress.

### *Applicable Law*

"Before a suspect may be subjected to a custodial interrogation, he must be advised that he has the right to remain silent, that his statements can be used against him and that he has a right to consult with or have an attorney present. [Citations.] In *Mathis v. United States* (1968) 391 U.S. 1, 4-5 . . . , the federal high court extended these safeguards to prison inmates." (*People v. Fradiue* (2000) 80 Cal.App.4th 15, 19, fn. omitted (*Fradiue*).) When reviewing a trial court's decision denying a motion to suppress under *Miranda*, we apply a de novo standard of review to legal issues but a deferential standard of review to factual determinations. (*People v. Waidla* (2000) 22 Cal.4th 690, 730.) The reviewing court "examines independently the resolution of a pure question of law; it scrutinizes for substantial evidence the resolution of a pure question of fact; it examines independently the resolution of a mixed question of law and fact that is predominately legal; and it scrutinizes for substantial evidence the resolution of a mixed question of law and fact that is predominately factual." (*Id.* at p. 730.) We accept the trial court's resolution of disputed facts and inferences and its evaluations of credibility, if supported by substantial evidence. (*People v. Cunningham* (2001) 25 Cal.4th 926, 992.)

The mere fact that a person is "in custody" does not necessarily make any questioning of that person a "custodial interrogation" for purposes of *Miranda*

advisements. (*Cervantes v. Walker* (9th Cir. 1978) 589 F.2d 424, 427-428.) In *People v. Macklem* (2007) 149 Cal.App.4th 674 (*Macklem*), this court addressed whether a defendant already in pretrial detention was in " 'custody for *Miranda* purposes' " when interviewed about a prison assault by a law enforcement official at the facility where he was confined. (*Id.* at pp. 686-687.) The question required an examination of the definition of custody in a jailhouse setting under *Cervantes*, at p. 427. (*Macklem*, at p. 678.)

In *Macklem*, the defendant was housed in a detention facility pending trial on a first degree murder charge when he was involved in a jailhouse attack on his cellmate. (*Macklem, supra*, 149 Cal.App.4th at pp. 678-681.) Several days after the incident, he was interviewed by a detective at the Vista detention facility, and made incriminating statements about the jailhouse assault without having been given any preceding *Miranda* warning. (*Macklem*, at p. 682.) Macklem unsuccessfully moved to suppress those statements, and on appeal from his conviction of murder and assault, he contended the trial court erred in denying his motion because his statements were the product of custodial interrogation obtained in violation of *Miranda*. (*Macklem*, at p. 678.)

Addressing this contention, *Macklem* reviewed the general legal principles pertaining to custody as reflected in *Miranda*, as well as the facts of *Mathis v. United States, supra*, 391 U.S. 1 and *Illinois v. Perkins* (1990) 496 U.S. 292 (*Perkins*), in which statements were elicited from jailhouse detainees. (*Macklem, supra*, 149 Cal.App.4th at pp. 689-691.) *Macklem* observed that *Perkins* required consideration of the interplay between police custody and police interrogation when assessing the need to provide

*Miranda* protections against coercion: "In the factual context of a prisoner in pretrial detention who is being questioned about a different offense than the one leading to the pretrial detention, the analysis of the current custodial status must take into account the type of custody, the type of questioning, and the identity of the questioner." (*Macklem*, at p. 691.) Analyzing the leading cases involving whether an inmate in pretrial detention was in "custody" for purposes of requiring *Miranda* warnings, *Macklem* concluded these cases rejected a per se custody rule, i.e., that "'custody is custody.'" (*Macklem*, at p. 694.) *Macklem* then proceeded to decide whether the defendant, when answering the detective's questions, was in custody in that case for *Miranda* purposes. (*Macklem*, at p. 695.) "This is a mixed question of law and fact, in which we ask: '[F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation . . . .' [Citation.] This is determined on the totality of the circumstances surrounding the alleged interrogation, to decide if prison officials applied additional restraints that further restricted [the defendant's] freedom, thereby triggering *Miranda* warning obligations." (*Id.* at p. 695, citing *Fradiue, supra*, 80 Cal.App.4th at p. 21.)

As recognized by the *Fradiue* court:

"In formulating an appropriate test in a prison setting, the court recognized that the usual test of whether a reasonable person would have believed he was free to leave ceases to be useful. [Citing *Cervantes v. Walker, supra*, 589 F.2d at p. 428.] Obviously, the inmate is not free to leave. The question must therefore shift to whether some extra degree of restraint was imposed upon the inmate to force him to participate in the interrogation. Four factors are significant in this inquiry: (1) the language used to summon the inmate for questioning, (2) the physical surroundings of the

interrogation, (3) the extent to which the inmate is confronted with evidence of his guilt, and (4) the additional pressure exerted to detain him." (*Fradiue, supra*, 80 Cal.App.4th at p. 20.)

In *Macklem*, this court adhered to *Fradiue's* approach and analyzed "whether some additional degree of restraint was imposed upon [Macklem] that forced him to participate in [the detective's] interview" considering the criteria summarized in *Fradiue* and other cases. (*Macklem, supra*, 149 Cal.App.4th at p. 695.) This analysis convinced the appellate court in *Macklem* that the trial court's order denying the defendant's suppression motion was proper. Focusing first on how the defendant was summoned to his interview, *Macklem* noted the detective requested that the housing deputy contact the defendant at his cell and ask him if he was willing to come out and talk and he was not required to do so. (*Macklem*, at p. 695.) As for the physical surroundings of the interview, *Macklem* observed the defendant had arrived in handcuffs but was then uncuffed and left there with the door ajar. (*Id.* at p. 696.) *Macklem* concluded the totality of these facts, including the fact the defendant was asked if he wanted to answer questions in the interview room, permitted a reasonable inference of his willingness to participate in the interview and weighed against any finding of coerciveness. (*Id.* at p. 696.) Indeed, *Macklem* observed that an interview room where attorneys and doctors consulted with the inmates was "as close to neutral territory as is available in the detention facility." (*Ibid.*)

Further, *Macklem* found no showing the defendant was confronted with evidence of his guilt, because the detective conducted the interview by asking him what he knew about the assault incident and terminated the interview when he started talking about his murder case. (*Macklem, supra*, 149 Cal.App.4th at p. 696.) Finally, *Macklem* concluded

the circumstances did not disclose any additional pressure was exerted to detain the defendant in a coercive manner, because he was treated like any other like-situated inmate. (*Id.* at pp. 679, 696.) Under the totality of these circumstances, *Macklem* held the trial court correctly determined that a reasonable person in the defendant's position would have realized he could end the questioning. (*Id.* at p. 696.)

### *Analysis*

We conclude Rodriguez's admission that his wound was self-inflicted was properly admitted. First, "the language used to summon the inmate for questioning" (*Fradiue, supra*, 80 Cal.App.4th at p. 20) provides no suggestion the questioning began in a coercive fashion, because Rodriguez was not summoned at all. (*Id.* at p. 20 ["defendant was not even summoned for questioning"].) Instead, Rodriguez was visited in his hospital room by an officer who believed Rodriguez was a victim, not a perpetrator, of a crime. A reasonable person approached in this fashion would not perceive such an approach to be coercive.

The physical surroundings of the interrogation were also not coercive. Rodriguez was questioned in an ordinary hospital room where he was being treated for his injuries, and he was free to (and did) move about the room after detectives arrived to interview him. (*Macklem, supra*, 149 Cal.App.4th at p. 696 [defendant given freedom of movement in room during interview].) This setting, which appears to be "as close to neutral territory as is available" (*ibid.*) for persons being treated for gunshot injuries while being detained, did not suggest that Rodriguez was being detained for purposes of an interrogation.

The record also supports the conclusion that Rodriguez was not coerced by being confronted with evidence of his guilt. To the contrary, the trial court found Toussaint approached Rodriguez sympathetically because Toussaint believed Rodriguez had been a victim. Indeed, even when Toussaint realized Rodriguez's description of the shooting appeared more consistent with an accident and therefore asked Rodriguez whether he had shot himself, Toussaint was not confronting Rodriguez with evidence of his guilt of being a felon in possession of a firearm because Toussaint did not know what probation violation had triggered the detention or that Rodriguez had suffered a felony conviction, and Toussaint was not considering charging Rodriguez with being a felon in possession of a firearm.

Finally, there was no additional pressure exerted on Rodriguez to admit to criminal activity in connection with the August 30 shooting. Indeed, Rodriguez's own actions revealed he knew he was entitled to cease talking to the officers, and the officers did not pressure him to continue talking about criminal conduct against his free will, because Rodriguez stopped talking to the officers when the conversation turned to the August 6 shooting.

We conclude, based on a totality of the circumstances, that Rodriguez's admission was not the product of a custodial interrogation for which *Miranda* advisements were required, but was instead in the nature of a "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens," which do not require *Miranda* advisements. (*Miranda v. Arizona, supra*, 384 U.S. at p. 477.) The trial court correctly denied Rodriguez's motion to suppress the admissions to Toussaint.

### C. Admission of Rodriguez's Prior Conviction

Rodriguez challenged the admission of the evidence of his 2004 conviction for the knife assault. He argues (1) it was inadmissible under Evidence Code section 1101 as propensity evidence, and (2) even if admissible under Evidence Code section 1101, subdivision (b), not excluding the evidence under Evidence Code section 352 was an abuse of discretion.

#### *The Ruling*

Rodriguez moved in limine to exclude any reference to his 2004 fight and resulting conviction. The prosecution argued it was admissible as relevant to three issues: (1) as a "predicate act" to establish that ESR was a gang within the meaning of section 186.22; (2) as evidence showing Rodriguez was an active participant in ESR who willfully promoted ESR's criminal conduct, and (3) as evidence relevant to Rodriguez's racial animus for purposes of establishing the "hate crime" enhancement under section 422.75, subdivision (a). The court ruled the evidence was admissible under Evidence Code section 1101 and its probative value outweighed its prejudicial impact under Evidence Code section 352.

#### *Legal Principles*

"Subdivision (a) of [Evidence Code] section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion." (*Ewoldt, supra*, 7 Cal.4th at p. 393.) Subdivision (b) of that section "clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when

such evidence is relevant to establish some fact other than the person's character or disposition." (*Ewoldt*, at p. 393, fn. omitted.) Evidence Code section 1101, subdivision (b), provides that nothing in that section "prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

In *Brown v. Smith* (1997) 55 Cal.App.4th 767, 791 (*Brown*), this court explained that under Evidence Code section 1101, subdivision (b), "the admissibility of prior act evidence "depends upon three principal factors: (1) the *materiality* of the fact sought to be proved or disproved; (2) the *tendency* of the [prior act] to prove or disprove the material fact; and (3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence." " (Italics omitted.) We noted that the "policy or rule" referred to is "primarily found in the provisions of Evidence Code section 352 and the weighing of the prejudicial effect of such evidence against its probative value." (*Brown*, at p. 791.)

*Brown* noted that, even where Evidence Code section 1101 does not require exclusion of the prior act evidence, a further inquiry under Evidence Code section 352 is required because such evidence " "is so prejudicial that its admission requires extremely careful analysis." " (*Brown, supra*, 55 Cal.App.4th at p. 791.) We further observed that since substantial prejudicial effect is inherent in such evidence, it is admissible only if it has substantial probative value. "Where the connection between the [prior acts] and the ultimate fact in dispute is not clear, the court should exclude the evidence." (*Ibid.*)

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." As explained by the court in *People v. Karis* (1988) 46 Cal.3d 612, 638, "[t]he prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' "

We review the trial court's rulings under Evidence Code sections 1101 and 352 for an abuse of discretion (*People v. Lewis* (2001) 25 Cal.4th 610, 637) and will not reverse an evidentiary ruling unless Rodriguez demonstrates a manifest abuse of that discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

### *Analysis*

We conclude Rodriguez's prior 2004 offense was admissible under Evidence Code section 1101 because it was relevant to "prove some fact . . . other than his . . . disposition to commit such an act," within the meaning of Evidence Code section 1101, subdivision (b). First, his crime was admissible as relevant to the "predicate offenses" elements required to be proved in this case. Both the substantive gang offenses (under § 186.22,

subd. (a)) and the gang enhancements (under § 186.22, subd. (b)) with which Rodriguez was charged required proof of a criminal street gang within the meaning of section 186.22, subdivision (f), which in turn required proof the gang engaged in a "pattern of criminal gang activity." (§ 186.22, subd. (f).) The term "pattern of criminal activity" required proof that gang members committed "one or more" predicate offenses (*ibid.*; see also *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323), and assault with a deadly weapon is one enumerated predicate offense. (See § 186.22, subd. (e)(1).) Rodriguez argues that *People v. Leon* (2008) 161 Cal.App.4th 149 holds it is error to admit evidence of a defendant's prior crimes as predicate crimes when there is adequate evidence of a sufficient number of other predicate crimes, and the prosecutor here did show two other predicate crimes. However, the statute specifically provides that a prosecutor must show "two *or more*" crimes and thus sanctions the admission of more than the minimum number of predicate offenses. Moreover, *Leon* did not conclude the evidence was *inadmissible* (under Evid. Code, § 1101) but instead held it should have been excluded (under Evid. Code, § 352) because of its cumulative nature (*People v. Leon*, at p. 169), which is a separate inquiry that we evaluate below.

Second, the prior assault conviction was relevant to show a separate aspect of the proof required in connection with the charged offenses and enhancements: that Rodriguez was aware of and willfully promoted gang criminal conduct. Evidence from which a jury could have found that Rodriguez had committed prior crimes benefitting the gang is admissible to show his active participation in ESR. (See, e.g., *In re Jose P.* (2003) 106 Cal.App.4th 458, 467-468.)

Finally, the hate crime enhancement required proof Rodriguez committed the attempted murder because of the victim's race. It was incumbent on the prosecution to show Rodriguez was motivated by racial animus (*People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 740), and the use of a prior incident of a similar assault provided circumstantial evidence from which the jury could have inferred Rodriguez's motive for the attack in this case was based on the victim's race.<sup>6</sup> (See generally *In re Joshua H.* (1993) 13 Cal.App.4th 1734, 1752.)

Although the evidence was admissible under Evidence Code section 1101, subdivision (b), it was still subject to potential exclusion under Evidence Code section 352 if its probative value was substantially outweighed by its prejudicial impact. (*People v. Leon, supra*, 161 Cal.App.4th at p. 168.) "[E]vidence of uncharged misconduct 'is so prejudicial that its admission requires extremely careful analysis.' " (*People v. Lewis, supra*, 25 Cal.4th at p. 637, quoting *Ewoldt, supra*, 7 Cal.4th at p. 404.) Because " 'substantial prejudicial effect [is] inherent in [such] evidence,' uncharged offenses are admissible only if they have *substantial* probative value. If there is any doubt, the evidence should be excluded." (*People v. Thompson* (1980) 27 Cal.3d 303, 318, fn. omitted, overruled on other grounds by *People v. Rowland* (1992) 4 Cal.4th 238, 260.)

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<sup>6</sup> Rodriguez claims on appeal there was *no* evidence that his 2004 attack was racially motivated because he asserts there was some evidence showing the victim "had words" with Rodriguez's brother, who felt threatened, and therefore there was *no* evidence that the assault was *unprovoked*. However, Rodriguez mischaracterizes the evidence. Detective Impola testified that the victim had *spoken* to Rodriguez's brother right before Rodriguez assaulted the victim, and Rodriguez admitted he was "offended" that the victim was speaking to him, and the victim was unsure why Rodriguez had become upset and stabbed him.

For example, *Ewoldt* noted that where uncharged offense evidence is cumulative, it will often be inadmissible under Evidence Code section 352. (*Ewoldt, supra*, 7 Cal.4th at pp. 405-406 ["[i]n many cases the prejudicial effect of such evidence [offered to show a common design or plan] would outweigh its probative value, because the evidence would be merely cumulative regarding an issue that was not reasonably subject to dispute"].)

However, we conclude the trial court did not abuse its discretion by admitting the evidence here. We recognize that Rodriguez has outlined the other evidence that showed the requisite predicate crimes and his association with ESR to support his claim that the evidence rendered the 2004 assault cumulative as to those issues. However, he has not identified how other evidence on two distinct issues—his awareness of and willful promotion of ESR's criminal conduct, and his racial animus—rendered the 2004 assault cumulative as to these latter issues. The record reflects the trial court carefully considered and weighed the relevant considerations and concluded the probative value of the evidence of Rodriguez's 2004 assault was not outweighed by its prejudicial impact, and we conclude that assessment was not beyond the bounds of reason.

#### D. Admission of the Yescas Letter

Rodriguez asserts the admission of the Yescas letter, seized from the jail cell of an ESR member in late 2005 and purportedly written by Rodriguez, was an abuse of discretion.

#### *Ruling*

Prior to trial, the prosecution sought to introduce a letter found during a November 2005 search of the jail cell of Carlos Yescas, an ESR member. The prosecution asserted

the letter, dated December 29, 2004, had been written by Rodriguez because (1) it was signed "Homeboy David R.," (2) it contained numerous references unique to ESR, and (3) there were materials found in Yescas's cell with Rodriguez's name and return address. Rodriguez objected to introduction of the Yescas letter because, absent a handwriting expert to testify that it was Rodriguez's handwriting or some evidence that the letter was inside an envelope with his return address on it, the letter could not be authenticated as one written by Rodriguez. The defense also objected to the letter on the ground that, because it was written more than seven months before the charged offenses, its probative value on Rodriguez's gang membership and motivations was outweighed by its prejudicial impact. The court ruled there was evidence from which the jury could have concluded Rodriguez was the author, and it was not too remote in time to show his gang affiliations, and therefore permitted the prosecutor to introduce the letter.

### *Legal Principles*

"Authentication of a writing is required before it may be received into evidence and before secondary evidence of its content may be received into evidence. (Evid. Code, § 1401.) 'Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.' (Evid. Code, § 1400.)" (*People v. Miller* (2000) 81 Cal.App.4th 1427, 1445.)

In this case, the admissibility of the writings depended on providing evidence showing Rodriguez was the author. (See, e.g., *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1372-1373.) Evidence Code section 403, subdivision (a), provides in pertinent part

that, "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: [¶] (1) The relevance of the proffered evidence depends on the existence of the preliminary fact . . . ." As explained in *People v. Marshall* (1996) 13 Cal.4th 799, the trial court's function is to determine " 'whether or not there is any sufficient evidence that could possibly support a finding that the foundational fact exists . . . .' (*Id.* at p. 832.) The proper standard is that of preponderance of the evidence. In other words, the trial court must determine whether the evidence is sufficient to permit the jury to find the preliminary fact true by a preponderance of the evidence [citation] even if the court personally would disagree [citation]." (*Id.* at pp. 832-833.)

However, even if the preliminary facts are established to demonstrate the *relevance* of the proffered evidence, the court still has discretion to exclude the evidence under Evidence Code section 352 if the probative value of the evidence is substantially outweighed by its prejudicial impact. (Cf. *People v. Olguin, supra*, 31 Cal.App.4th at pp. 1372-1373.) We review the latter determination under the deferential abuse of discretion standard. (*Ibid.*)

### *Analysis*

The trial court did not err in admitting the Yescas letter because there was evidence from which the jury could have found, by a preponderance of the evidence, that Rodriguez was the author. First, the letter was written to and in the possession of

Mr. Yescas, with whom Rodriguez was personally acquainted.<sup>7</sup> Second, there was some evidence (apart from the letter) that Rodriguez was an ESR member and hence also shared a gang affiliation with Yescas. Third, it was signed "Homeboy David R.," which employs terminology ("homeboy") signifying gang membership, and the first name and last initial matched Rodriguez's first name and last initial. Fourth, there were papers found in Yescas's cell with Rodriguez's name and return address and, although the Yescas letter was not physically attached to these return addresses, there was no evidence that any other envelopes were found in Yescas's cell with a return address for any other person whose name was David and whose last name began with the letter "R." Finally, the letter employed techniques that an expert concluded were unique to ESR members. There was sufficient evidence from which a jury could have concluded, by a preponderance of the evidence, that Rodriguez was the author of the Yescas letter.

Rodriguez asserts that, even assuming the foundational showing was adequate, the trial court abused its discretion when it denied his motion under Evidence Code section 352 to exclude the letter as more prejudicial than probative. He argued below, and reasserts on appeal, that the probative value of the letter was diluted by the fact the letter was written many months before the charged offenses. Rodriguez argues any minimal probative value of this stale letter was outweighed by the highly inflammatory allusion that the author was "kicking it like a [villain] snail killin-chew," because the gang expert

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<sup>7</sup> There was evidence that, in May 2002, an officer responded to a "shots fired" call and Rodriguez was seen running from the vicinity along with several other individuals, among whom was Yescas.

explained the term "snail" was a derogatory reference used by ESR members to refer to Black gang members.<sup>8</sup> However, the contested issues here involved Rodriguez's gang affiliation, as well as whether the victim was targeted for racial reasons. Although the words of the letter may have been damaging, that is not the test for exclusion under Evidence Code section 352. " 'In applying [Evidence Code] section 352, "prejudicial" is not synonymous with "damaging." ' " (*People v. Callahan* (1999) 74 Cal.App.4th 356, 371.) The "undue prejudice" with which Evidence Code section 352 is concerned is "not . . . evidence that proves guilt, but . . . evidence that prompts an emotional reaction against the defendant and tends to cause the trier of fact to decide the case on an improper basis: 'The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. "[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.' " ' " (*People v. Walker* (2006) 139 Cal.App.4th 782, 806.) Although the

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<sup>8</sup> On appeal, Rodriguez also argues the court's ruling under Evidence Code section 352 was an abuse of discretion because the prejudicial impact of the letter was magnified by the letter's oblique reference to Rodriguez being incarcerated as well as sexual references in the letter. However, Rodriguez neither raised these complaints below nor, contrary to his argument on appeal, sought to have those references redacted from the copy given to the jury. Rodriguez has forfeited these issues by not raising them below. (Evid. Code, § 353, subd. (a); *People v. Holt* (1997) 15 Cal.4th 619, 666-667 [a claim of the erroneous admission of evidence is preserved for appeal if the timely objection to admission of the evidence alerted the trial court to the nature of the anticipated evidence and the basis on which exclusion was sought and afforded the opposing party an opportunity to establish its admissibility]; see also *People v. Marks* (2003) 31 Cal.4th 197, 228 ["[a] general objection to the admission or exclusion of evidence, or one based on a different ground from that advanced at trial, does not preserve the claim for appeal"].)

evidence contained in the letter may have damaged Rodriguez's denial of his gang membership or whether he would select targets based on race, that is no basis for exclusion under Evidence Code section 352. We are not convinced it was an abuse of discretion to conclude the letter was not too remote in time to have probative value: it permitted the inference that Rodriguez was a longstanding member of ESR who was well versed in its subculture and who adhered to its tenets during the relevant time frame.

E. Admission of Evidence of the Sweat Homicide

Rodriguez asserts the court abused its discretion when it overruled his Evidence Code section 352 objection to introduction of evidence of the Sweat homicide.<sup>9</sup>

*The Evidence and Ruling*

During the prosecution's questioning of Toussaint concerning ESR, the prosecution elicited testimony about several predicate crimes by ESR members, to provide the foundation for Toussaint's opinion that the activities of ESR qualified it as a gang for purposes of section 186.22. The predicate crimes described by Toussaint included a conviction of ESR member Arturo Placentia for a 2002 attempted murder of two Black males, a guilty plea by ESR member Roberto Gonzalez to a charge of assault with a deadly weapon in connection with a 2003 incident, and Rodriguez's conviction for assault with a deadly weapon in connection with the knife assault.

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<sup>9</sup> Rodriguez appears to argue the evidence also should have been excluded as improper propensity evidence pursuant to Evidence Code section 1101, subdivision (a). However, this objection was not raised below and is therefore waived. (See *People v. Doolin* (2009) 45 Cal.4th 390, 437 [relevancy and Evid. Code, § 352 objections do not preserve claim that trial court admitted evidence in violation of Evid. Code, §§ 1101 & 1102].)

The prosecution then asked about a 2002 homicide in which Anthony Sweat, a 13-year-old Black male, was killed. The defense objected under Evidence Code section 352, arguing the evidence was cumulative. The court overruled the objection, and Toussaint testified Sweat was killed at a house approximately two blocks from the gas station and Mr. Barbarin, an ESR member, was in custody for that homicide. Toussaint also explained the Sweat killing occurred during a particularly violent time in the warfare between the ESR gang and the 1200 Blocc Crips gang, and that police continue to see that violence at present.

### *Legal Principles*

Rodriguez concedes that evidence showing crimes by other gang members is admissible to demonstrate the requisite "pattern of criminal gang activity" (see, e.g., *People v. Gardeley* (1996) 14 Cal.4th 605, 624-626), as well as to provide a foundation for expert opinions. (*Id.* at pp. 617-619.) However, gang evidence is still subject to scrutiny and potential exclusion under Evidence Code section 352. (*People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1369.)

### *Analysis*

Rodriguez argues that because "other crimes" evidence is so laden with potentially prejudicial impacts, it should only be admitted when it has substantial probative value and, "[i]f evidence [of other offenses] is 'merely cumulative with respect to other evidence which the People may use to prove the same issue,' it is excluded under a rule of necessity." (*People v. Thompson*, *supra*, 27 Cal.3d at p. 318; *People v. Pitts* (1990) 223 Cal.App.3d 606, 831.) He asserts that, because the Sweat homicide was cumulative to

the evidence of other predicate crimes, it was an abuse of discretion to admit that evidence.

We are not persuaded by Rodriguez's claim, for several reasons. First, the authorities cited by Rodriguez involved the inherent prejudice accompanying evidence of "other crimes" *by the defendant*. There was no suggestion here that Rodriguez was a principal in the Sweat homicide; to the contrary, the jury was told someone else was in custody for that killing. Second, although the evidence may have been cumulative as to *predicate* crimes, it was admissible to reinforce that ESR members engaged in violence toward Blacks in the vicinity of the charged offense, from which the jury could infer that both the "gang benefit" and "hate crime" allegations appended to the attempted murder charge against Rodriguez were true. Finally, while there may have been some incremental inflammatory effect associated with evidence that the gang violence claimed a victim of a tender age, the references to the Sweat murder were not sensationalized, and there was no hint that Rodriguez was a principal in that murder; instead, the testimony (which consumed less than two pages of reporter's transcript) was limited to a brief recitation of the date and location of the crime, the suspected perpetrator of the crime, and the fact that it occurred during a particularly violent period in the war between the ESR gang and the 1200 Blocc Crips gang. We conclude the court did not exceed the bounds of reason in concluding the probative value of the evidence was not outweighed by its cumulative nature.

## F. Evidence of the Gang Offenses and Enhancements

Rodriguez argues that, apart from the improperly admitted opinion testimony from the gang experts, there is no substantial evidence to support the jury's guilty verdict on the substantive gang offenses or true findings on the gang enhancements.

### *Legal Standards*

The California Street Terrorism Enforcement and Prevention Act (§ 186.20 et seq., hereafter the STEP Act) encompasses both a substantive offense (under § 186.22, subd. (a)) as well as an enhancement (under § 186.22, subd. (b)(1)).

In relevant part,<sup>10</sup> a person is guilty of the substantive offense (§ 186.22, subd. (a)) when he or she "actively participates in [a] criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and . . . willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang . . . ." (*Ibid.*) "[A] person 'actively participates in any criminal street gang,' within the meaning of section 186.22[, subdivision] (a), by 'involvement with a criminal street gang that is more than nominal or passive.'" (*People v. Casteneda* (2000) 23 Cal.4th 743, 752.) A person can be found to have willfully promoted, furthered, or assisted in any felonious criminal conduct by gang members either when he or she is "the perpetrator of felonious gang-related criminal conduct [or the] aider and abettor." (*People v. Ngoun* (2001) 88 Cal.App.4th 432, 436.)

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<sup>10</sup> Although there are numerous additional elements required either for conviction on the substantive offense or a true finding on the enhancement, we need not detail those requirements because Rodriguez does not claim the evidence was insufficient to support the verdicts on these other elements.

A person is subject to increased punishment under the gang enhancement (§ 186.22, subd. (b)(1)) for a felony related to a criminal street gang. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.) The enhancement applies when the prosecution proves that the crimes for which the defendant was convicted were committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) The first element of the gang enhancement is thus whether the crime was committed (1) for the benefit of any criminal street gang, or (2) at the direction of any criminal street gang, or (3) in association with any criminal street gang. (§ 186.22, subd. (b)(1).) The second element is whether the defendant committed the crime with the specific intent to promote, further, or assist in any criminal conduct by gang members. (*Ibid.*)

The prosecution may meet its burden of establishing the statutory gang elements set forth in section 186.22 by presenting expert testimony about criminal street gangs. (*People v. Gardeley, supra*, 14 Cal.4th at pp. 617-620; *People v. Hernandez, supra*, 33 Cal.4th at pp. 1047-1048.) "It is well settled that a trier of fact may rely on expert testimony about gang culture and habits to reach a finding on a gang [enhancement] allegation." (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196 (*Frank S.*)). Expert testimony about gang culture and habits may include, but is not limited to, testimony about the size, composition or existence of a gang; gang turf or territory; an individual defendant's membership in, or association with, a gang; the primary activities of a specific gang; motivation for a particular crime, generally retaliation or intimidation;

whether and how a crime was committed to benefit or promote a gang; rivalries between gangs; and gang-related tattoos, graffiti, hand signs, colors, or attire. (*Id.* at p. 1197; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-657 (*Killebrew*).) A gang expert may also "render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth,' [but such] a hypothetical question must be rooted in facts shown by the evidence." (*Gardeley*, at p. 618.)

When a criminal defendant challenges the sufficiency of the evidence on appeal, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*Ibid.*) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

We apply the same deferential standard to determine the sufficiency of the gang enhancement evidence (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224; *Killebrew*, *supra*, 103 Cal.App.4th at p. 660) as well as convictions based largely on circumstantial evidence. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.) The test is not whether the evidence proves guilt beyond a reasonable doubt, but whether substantial evidence, of

credible and solid value, supports the jury's conclusion. (*People v. Arcega* (1982) 32 Cal.3d 504, 518.)

#### *Challenge to Admission of Opinion Testimony*

Rodriguez initially argues the court erred in overruling his objections to the expert's testimony that Rodriguez was an active member in ESR during the period of the offenses.<sup>11</sup> Although an expert may not testify about the subjective intent of a particular defendant (*Killebrew, supra*, 103 Cal.App.4th at p. 658), numerous courts have concluded an individual defendant's membership in, or association with, a gang is a proper subject on which an expert may testify. (See *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506; *Killebrew*, at p. 657 [cataloguing cases].) The trial court properly overruled Rodriguez's objection.

#### *Challenge to Sufficiency of the Evidence*

Rodriguez argues the evidence was insufficient to support the conclusion he was an "active participant" in ESR within the meaning of section 186.22, subdivision (a). However, the expert's opinion provided evidence of his membership, and other circumstantial evidence buttressed that conclusion. Rodriguez was found in the company of other ESR members on at least two prior occasions, including one occasion when he was contacted as he and other ESR members were running away from the vicinity of a "shots fired" report, which provides evidence to support a finding of active participation.

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<sup>11</sup> Rodriguez does not assert on appeal that it was improper for the expert to testify either that attacks by ESR members on Blacks benefited ESR and were indeed at the direction of the gang, or that gang members who carry loaded weapons while patrolling the streets benefit the gang.

(*In re Jose P.*, *supra*, 106 Cal.App.4th at p.468.) In his correspondence to Yescas, Rodriguez described himself as a "snail-killin chew" and as a "homeboy" of Yescas (an ESR member), and the expert explained that an individual who claims gang affiliation without a basis is subject to retaliation. Rodriguez also had a tattoo that a jury could have found signified ESR membership. Finally, when his home was searched after the gas station shooting, ESR-related correspondence and paraphernalia was uncovered, providing support for the conclusion that he remained an active member of ESR. Substantial evidence supports the finding Rodriguez was an active participant in ESR at the time of the offenses.

Rodriguez also argues there is no evidence from which a rational jury could have found he willfully promoted, furthered, or assisted felonious criminal conduct by gang members for purposes of counts 5 and 7 (§ 186.22, subd. (a)), or that the other crimes of which he was convicted were committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" for purposes of the section 186.22, subdivision (b)(1), enhancement. Before evaluating these claims, we must provide a fuller explanation of the evidentiary landscape established below.

Toussaint testified the violence between ESR and the 1200 Blocc Crips was rooted in the 1991 "Tiny Dukes" conspiracy. This conspiracy involved an agreement between ESR and 1200 Blocc Crips to briefly align for the purposes of attacking rival gangs from other areas. The so-called "Mexican Mafia" was angered that a Hispanic gang (ESR) would align with a Black gang (1200 Blocc Crips), and therefore put out a "green light"

that authorized other Hispanic gangs to retaliate against ESR members. However, the "green light" was accompanied by an escape clause providing that if ESR members would attack 1200 Blocc Crips members, ESR would be reinstated to the good graces of the Mexican Mafia and the green light would be rescinded. As a result, ESR members began violently assaulting 1200 Blocc Crips members, and 1200 Blocc Crips responded by violently assaulting ESR members. Over time, the targets of ESR's attacks evolved from targeting 1200 Blocc Crips members to attacks on Blacks who *might* have been 1200 Blocc Crips members.

Toussaint explained that violent attacks benefit a gang in general by bolstering the reputation of the gang and by eliminating competitors for the territory the gang occupies and dominates. Moreover, explained Toussaint, violence by ESR members against perceived 1200 Blocc Crips members had the added benefit of ESR's self-preservation by restoring ESR to the good graces of the Mexican Mafia by complying with its directives.

Against this background, we first evaluate the counts arising from the August 6, 2005, gas station shooting before turning to the counts connected to the August 30 events. As to the gang offense and gang enhancements arising from the gas station shooting, after the jury determined Rodriguez was the shooter,<sup>12</sup> it had sufficient evidence to support the 186.22, subdivision (a), charge in connection with the gas station shooting, because a person willfully promotes, furthers, or assists in felonious criminal conduct by gang members within the meaning of section 186.22, subdivision (a), when he is the direct

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<sup>12</sup> Rodriguez does not contest that substantial evidence supported the jury's determination he was the shooter.

perpetrator of the felonious criminal conduct. (*People v. Salcido* (2007) 149 Cal.App.4th 356, 367-368.) There was also substantial evidence to support a true finding on the enhancement. The first element, whether the crimes were committed for the benefit or at the direction of any criminal street gang, is supported by the evidence of the benefits that accrued to ESR from the shooting. The second element, whether Rodriguez committed the crime with the specific intent to promote, further, or assist in criminal conduct by gang members, is supported by the evidence that Rodriguez described himself as a "snail [Black] killin-chew" just a few months before he shot at a car full of Blacks suddenly and without provocation, which was consistent with the ongoing pattern of violence by ESR members against Blacks.

As to the August 30 counts, we evaluate whether there was evidence from which a rational jury could have found Rodriguez willfully promoted, furthered, or assisted felonious criminal conduct by gang members for purposes of count 7 (§ 186.22, subd. (a)), and whether his conviction for being a felon in possession of a firearm (§ 12021, subd. (a)) as alleged in count 6 was a crime committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" for purposes of the section 186.22, subdivision (b)(1), enhancement. Rodriguez argues that, under *Frank S., supra*, 141 Cal.App.4th 1192 and its progeny (see *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*); *People v. Ochoa* (2009) 179 Cal.App.4th 650), the expert's *opinion* that Rodriguez's possession of the firearm promoted crimes by ESR's members (for purposes of the § 186.22, subd. (a), offense), or that it benefitted ESR (for purposes of the

§ 186.22, subd. (b)(1), enhancement), cannot provide substantial *evidence* to support the jury's determinations.

The *Frank S.* decision was rooted in that court's earlier decision in *Killebrew*, *supra*, 103 Cal.App.4th 644, concerning the proper scope of, and limits on, expert testimony. The court in *Killebrew* concluded that, while some subjects are properly matters on which an expert may testify, a court cannot allow experts to express *any* opinion they may have about gangs and gang activities. (*Killebrew*, at pp. 651, 654.) The defendant in *Killebrew* was one of several men arrested in connection with a drive-by shooting. He was not inside any of the three cars police suspected were involved, but was standing on a nearby corner when police stopped one of the cars. The discovery of a handgun at a nearby taco stand and in at least one of the cars formed the basis for *Killebrew*'s prosecution for conspiring to possess a handgun. (*Id.* at pp. 647-649.) The court reversed his conviction on appeal. (*Id.* at p. 647.) The error identified in *Killebrew* was that "in response to hypothetical questions, the People's gang expert exceeded the permissible scope of expert testimony by opining on 'the *subjective knowledge and intent* of each' of the gang members involved in the crime." (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550-1551.) The expert testified that each of the individuals in a caravan of three cars knew there were guns in two of the cars and jointly possessed the guns with everyone else in the three cars for mutual protection. (*Id.* at p. 1551.) However, "*Killebrew* does not preclude the prosecution from eliciting expert testimony to provide the jury with information from which the jury may infer the motive for a crime or

the perpetrator's intent; *Killebrew* prohibits an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial." (*Ibid.*)

Cases that have examined *Killebrew's* limitations on expert opinions have largely been limited to intermediate appellate court opinions.<sup>13</sup> In *Frank S.*, an officer detained the minor for a traffic infraction and discovered a knife, a bindle of methamphetamine, and a red bandana on the minor. The People charged the minor with carrying a concealed dirk with a corresponding gang enhancement, as well as other charges. (*Frank S., supra*, 141 Cal.App.4th at p. 1195.) The prosecution's gang expert testified the minor was a gang member and the substantive offense was committed to benefit his gang because "a gang member would use the knife for protection from rival gang members and to assault rival gangs." (*Ibid.*) The *Frank S.* court reversed the enhancement, finding "nothing besides weak inferences and hypotheticals show the minor had a gang-related purpose for the knife." (*Id.* at p. 1199.) The court explained that:

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<sup>13</sup> It appears the Supreme Court has made only two forays into the *Killebrew* issues. The first case, *People v. Ward* (2005) 36 Cal.4th 186, 210, appears only to have noted that the expert opinions at issue fell within the gang culture and habit evidence approved in *Gardeley*. The second case, *People v. Gonzalez* (2006) 38 Cal.4th 932, again distinguished the circumstances of the case and rejected the defendant's claim of *Killebrew* error in the guilt phase, by noting the challenged testimony was "quite typical of the kind of expert testimony regarding gang culture and psychology that a court has discretion to admit." (*Gonzalez*, at p. 945.) "[W]ithout deciding" whether *Killebrew* was correct "in this respect," the *Gonzalez* court read the case as "merely 'prohibit[ing] an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial.'" (*Gonzalez*, at p. 946.) The Supreme Court attempted to clarify its comments in dicta included in a footnote: "Obviously, there is a difference between testifying about specific persons and about hypothetical persons. It would be incorrect to read *Killebrew* as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons." (*Id.* at p. 946, fn. 3.)

"[U]nlike in other cases, the prosecution presented no evidence other than the expert's opinion regarding gangs in general and the expert's improper opinion on the ultimate issue to establish that possession of the weapon was 'committed for the benefit of, at the direction of, or in association with any criminal street gang. . . .' [Citation.] The prosecution did not present any evidence that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense. In fact, the only other evidence was the minor's statement to the arresting officer that he had been jumped two days prior and needed the knife for protection. To allow the expert to state the minor's specific intent for the knife without any other substantial evidence opens the door for prosecutors to enhance many felonies as gang-related and extends the purpose of the statute beyond what the Legislature intended." (*Ibid.*)

Thus, *Frank S.* concluded that something more than an expert witness's unsubstantiated opinion that a crime was committed for the benefit of, at the direction of, or in association with, any criminal street gang is required to provide evidentiary support for a true finding on a gang enhancement.

In *Ramon, supra*, 175 Cal.App.4th 843, the court again concluded the evidence on the specific intent prong of gang enhancement findings was insufficient. In *Ramon*, police stopped the defendant (a conceded gang member) while he was driving a stolen vehicle, within his gang's territory with a fellow gang member in the passenger seat, and found a loaded, unregistered firearm under the driver's seat. (*Id.* at pp. 846-849.) The People charged the defendant with receiving a stolen vehicle, possession of a firearm by a felon, possession of a firearm while an active gang member, and carrying a loaded firearm in public for which he was not a registered owner, as well as corresponding gang enhancements. (*Id.* at p. 848.) At trial, an expert gang witness testified that one of the gang's primary activities was car theft, and stated that by driving a stolen vehicle and

bearing an unregistered firearm within his gang's territory, the defendant could conduct numerous crimes and simply dump the vehicle and gun thereafter, and both the car and the weapon could be used to spread fear and intimidation within the gang's territory. (*Id.* at pp. 847-849.) In response to a hypothetical mirroring the facts of the case, the expert concluded that the defendant's crimes would benefit his gang, and the jury convicted the defendant of all the substantive counts and found true three of the four gang enhancement allegations. (*Ibid.*)

The *Ramon* court vacated the gang enhancements, concluding the only evidence supporting an inference that the defendant committed the instant crimes with the specific intent to promote, further, or assist criminal conduct by gang members was the witnesses' impermissible speculation, stating that "[t]he People's expert simply informed the jury of how he felt the case should be resolved. This was an improper opinion and could not provide substantial evidence to support the jury's finding. There were no facts from which the expert could discern whether [the defendant and his compatriot] were acting on their own behalf the night they were arrested or were acting on behalf of [their gang]." (*Ramon, supra*, 175 Cal.App.4th at p. 851.) Thus, *Ramon* followed *Frank S.* by requiring that some substantive factual evidentiary basis, apart from an expert witness's opinion, support the requisite elements. (Accord, *People v. Ochoa, supra*, 179 Cal.App.4th at p. 657 ["A gang expert's testimony alone is insufficient to find an offense gang related. [Citation.] '[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a

finding that the *crime* was committed for the benefit of, at the direction of, or in association with a criminal street gang.' "].)

We distill from these cases the principle that reversal is required when the gang expert's testimony was the only evidence offered by the prosecution to establish the elements of the crime and there is no other evidence from which a reasonable jury could infer intent. "To allow the expert to state the minor's specific intent . . . without any other substantial evidence opens the door for prosecutors to enhance many felonies as gang-related and extends the purpose of the statute beyond what the Legislature intended." (*Frank S.*, *supra*, 141 Cal.App.4th at p. 1199.) However, reversal is not required in cases where there is *other* evidence, apart from and in addition to the expert's opinion, to support an inference the alleged crime was committed for the benefit of the gang. For example, in *People v. Ferraez*, *supra*, 112 Cal.App.4th 925, the defendant was arrested for possession for sale of rock cocaine, and was charged with the drug offense, a gang enhancement appended to that offense, and a section 186.22, subdivision (a), count based on that drug offense. (*Ferraez*, at pp. 927-928.) The expert testified the sale promoted, assisted or furthered the criminal conduct of the gang, and benefitted the gang, by raising funds that could be use to assist other gang members or to purchase weapons for the gang. The defendant claimed he was selling the drugs for personal reasons (to support his own habit) and had been given permission to sell within the gang territory. (*Id.* at pp. 928-929.) Upholding the sufficiency of the evidence, the court concluded that "[u]ndoubtedly, the expert's testimony alone would not have been sufficient to find the

drug offense was gang related. But here it was coupled with other evidence from which the jury could reasonably infer the crime was gang related." (*Id.* at p. 931.)

In this case, there *was* other evidence (apart from the gang expert's opinion) from which the jury could have found that Rodriguez's possession of the firearm on August 30 promoted, assisted or furthered the criminal conduct of the gang within the meaning of the section 186.22, subdivision (a), offense, and was done with the specific intent to benefit the gang within the meaning of the section 186.22, subdivision (b)(1), enhancement. The expert testified that ESR members armed themselves for defensive purposes, and also are armed for offensive purposes if a target of opportunity presents itself. These targets of opportunity included attacks on Black persons to further ESR's goal of rehabilitating itself with the Mexican Mafia. Rodriguez had shown, by words and deeds, that he was a willing adherent to these goals: he had described himself as a "snail-killin chew"; he kept paraphernalia touting ESR values and denigrating "snails"; he had seized on a target of opportunity to attack a Black person with a knife; and, just three weeks before the August 30 offense, Rodriguez was armed with a loaded handgun and had seized on a target of opportunity to use his loaded handgun to open fire on a group of Blacks. This evidence, which is apart from and in addition to the expert's opinion, would permit a rational trier of fact to conclude Rodriguez possessed the handgun for a specific gang purpose and benefit.

#### G. Evidence of the Hate Crime Enhancements

The jury found true the enhancements that Rodriguez committed counts 1 and 2 "because of the victim's race, color, religion, nationality, country of origin, ancestry,

disability, gender, or sexual orientation within the meaning of section 422.75, subdivision (a)." Rodriguez contends the evidence was insufficient that the attempted murder (count 1) and shooting at the occupied vehicle (count 2) was committed because of the victim's race.

Section 422.75, subdivision (a), provides for a one- to three-year enhancement when a person "commits a felony that is a hate crime or attempts to commit a felony that is a hate crime." A "hate crime" is defined to mean "a criminal act committed, in whole or in part, because of," among other things, the victim's nationality, race, or ethnicity (§ 422.75, subd. (a)(3) & (4)), including his or her ancestry or color (§ 422.56, subd. (f)). The term "in whole or in [part] because of" is defined in section 422.56, subdivision (d), to mean that "the bias motivation must be a cause in fact of the offense, whether or not other causes also exist. When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the particular result." (§ 422.56, subd. (d); see also *People v. Superior Court (Aishman)*, *supra*, 10 Cal.4th at p. 740.) "The statute requires the state to show evidence of bigotry relating directly to the defendant's intentional selection of this particular victim upon whom to commit the charged crime. The state must directly link the defendant's bigotry to the invidiously discriminatory selection of the victim and to the commission of the underlying crime." (*In re Joshua H.*, *supra*, 13 Cal.App.4th at p. 1753.)

The defendant's state of mind at the time of an offense "is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense" (*People v. Pre* (2004) 117 Cal.App.4th 413, 420) or from other

circumstantial evidence. (*People v. Jung* (1999) 71 Cal.App.4th 1036, 1043.) Here, the circumstances surrounding the crime provided some evidence that the victim's race was the motivating factor. It was undisputed the victim, and the people he was riding with, were Black. There was no evidence that either the victim or any of his companions did anything to provoke the attack. Moreover, the evidence permitted the conclusion Rodriguez specifically targeted the victim and his companions: the bullets largely struck their car, suggesting Rodriguez was aiming at their car, and there was no evidence that anyone else had provoked an attack in which the victim and his companions were mere innocent bystanders caught in the line of fire. Additionally, Rodriguez's animus toward Blacks could be inferred from his deeds (the prior unprovoked knife attack on a Black man) and his words (his letter to Yescas). Finally, the expert testified that the gang to which Rodriguez belonged purposefully and repeatedly targeted persons based on their Black appearance. There was sufficient circumstantial evidence to support the true finding on the hate crime enhancements.

#### H. Failure to Instruct on the Lesser Included Offense

Rodriguez argues the court was sua sponte obligated to instruct on section 246.3 as a lesser included offense to the section 246 charge involving Roger Barrett (count 3). In *People v. Ramirez* (2009) 45 Cal.4th 980, 985-990, the court concluded that, under the elements test, section 246.3 is a lesser included offense to a charge alleging violation of section 246. The *Ramirez* court, citing *People v. Overman* (2005) 126 Cal.App.4th 1344 (*Overman*), concluded section 246 cannot be violated without also violating section 246.3 (*Ramirez*, at pp. 986, 990), and therefore held that a defendant could not be convicted of

both a count alleging a grossly negligent shooting (§ 246.3) and a count alleging shooting at an inhabited dwelling (§ 246) based on the same shot.

Although section 246.3 is a lesser included offense to a section 246 charge, the court's sua sponte obligation to instruct on the lesser charge arises only "when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged." (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Rodriguez asserts, because a jury could have concluded from the evidence that the shot that struck Barrett's car was a stray shot that missed the targeted car, the jury could have concluded the shooting of Barrett's vehicle violated section 246.3 rather than section 246.

In *Overman, supra*, 126 Cal.App.4th 1344, the court explained at page 1356 that:

"The act of shooting 'at' an inhabited or occupied target was defined in *People v. Chavira* (1970) 3 Cal.App.3d 988 . . . . There, the defendant and his associates fired several shots at persons 'congregated in front of, and on the driveway leading to' an inhabited dwelling. (*Id.* at p. 993.) The defendant argued that the evidence was insufficient to support his section 246 conviction, because he did not fire 'at' the dwelling but 'at' persons outside it. (*Id.* at p. 992.) The court rejected this argument, noting that '[d]efendant and his associates engaged in a fusillade of shots directed primarily at persons standing close to a dwelling.' (*Id.* at p. 993, fn. omitted.) On this basis, the court reasoned, '[t]he jury was entitled to conclude that they were aware of the probability that some shots would hit the building and that they were consciously indifferent to that result. That is a sufficient "intent" to satisfy the statutory requirement [of section 246].' (*Ibid.*) [¶] As *Chavira* demonstrates, section 246 is not limited to the act of shooting directly 'at' an inhabited or occupied target. Rather, the act of shooting 'at' a proscribed target is also committed when the defendant shoots in such close proximity to the target that he shows a conscious indifference to the probable consequence that one or more bullets will strike the target or persons in or around it. The defendant's conscious indifference to the

probability that a shooting will achieve a particular result is inferred from the nature and circumstances of his act. [Fn. omitted.]"

Additionally, *Overman* noted "section 246 is a general intent crime [that] is violated when a defendant intentionally discharges a firearm either directly at a proscribed target (e.g., an inhabited dwelling house or occupied building) or in close proximity to the target under circumstances showing a conscious disregard for the probability that one or more bullets will strike the target or persons in or around it. *No specific intent to strike the target*, kill or injure persons, or achieve any other result beyond shooting at or in the general vicinity or range of the target is required." (*Overman, supra*, 126 Cal.App.4th at p. 1361.) Thus, a defendant is guilty of violating section 246 if the defendant has the requisite general intent<sup>14</sup> of intentionally firing either (1) at a proscribed target, or (2) in close proximity to a proscribed target under circumstances showing a conscious disregard for the probability that one or more bullets will strike a proscribed target or persons in or around it.

In this case, there is no evidence the offense was less than a violation of section 246. There is no claim, much less any evidence, that Rodriguez fired the shots accidentally. Moreover, the only evidence is that Rodriguez, while shooting at Edward's

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<sup>14</sup> The People argue that the doctrine of "transferred intent" should apply because Rodriguez intended to shoot at Edward's vehicle, and this intent should be transferred to other cars actually struck by the bullets. However, transferred intent appears to be limited to specific intent crimes (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1737-1738), which precludes its application here.

car, also shot either "at" Barrett's car<sup>15</sup> or, at a minimum, intentionally discharged a firearm in close proximity to a proscribed target under circumstances showing a conscious disregard for the probability that one or more bullets would strike a proscribed target. Rodriguez's argument—that there was evidence Barrett was not Rodriguez's target—is irrelevant because section 246 is violated by "a conscious disregard for the probability that one or more bullets will strike the target or persons in or around it [and] [n]o specific intent to strike the target . . . is required." (*Overman, supra*, 126 Cal.App.4th at p. 1361.) Under these circumstances, there was no sua sponte obligation to instruct on section 246.3 because there is no substantial evidence from which a jury could have found Rodriguez committed the lesser, but not the greater, section 246 offense.

### I. The Sentencing Claims

Rodriguez argues the sentence was erroneous, for two reasons. First, he argues the court should have stayed under section 654 the punishment imposed for count 7 (violation of § 186.22, subd. (a)) because the underlying conduct was the same conduct underlying the conviction on count 6 (felon in possession of a firearm in violation of § 12021, subd. (a)). Second, he argues the court abused its discretion by imposing the upper terms on count 6 (as well as the gang enhancement appended to that count) because

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<sup>15</sup> Because the bullet actually struck Barrett's car, Rodriguez discharged a firearm directly at a proscribed target (e.g. Barrett's car), and the gun was not fired unintentionally.

the factors cited by the court to justify the upper term is not supported by any evidence in the record.

### *The Sentence*

In the proceedings below, the court imposed a consecutive upper term of six years for the conviction on count 6 (felon in possession of a firearm), plus a consecutive four-year term for the gang enhancement (§ 186.22, subd. (b)), and a consecutive term for the conviction on count 7 (§ 186.22, subd. (a)) for Rodriguez's gang participation offense.

### *The Section 654 Argument*

Section 654, subdivision (a), as relevant here, provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 " ' "has been applied not only where there was but one 'act' in the ordinary sense . . . but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654." [Citation.] [¶] Whether a *course of criminal conduct* is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' " (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507, italics added by *Rodriguez*.) "[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating[, ] one objective, defendant may be found

to have harbored a single intent and therefore may be punished only once. [Citation.] [¶]

If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' "

(*People v. Harrison* (1989) 48 Cal.3d 321, 335.) We apply a deferential standard when reviewing a section 654 challenge on appeal, because " '[a] trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence.' " (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1336-1337.)

The People, relying on *People v. Herrera* (1999) 70 Cal.App.4th 1456 (*Herrera*), argue section 654 does not bar multiple punishments in this case. Rodriguez, relying on *People v. Sanchez* (2009) 179 Cal.App.4th 1297 (*Sanchez*), argues section 654 does bar multiple punishments in this case. We examine those cases to resolve this difficult question.

### *Herrera*

In *Herrera*, the court examined the application of section 654 to a defendant convicted of a count under section 186.22, subdivision (a), in addition to an underlying offense of attempted murder. There, two gangs had engaged in a series of retaliatory shootings, and the defendant (along with another member) drove by a house identified with the rival gang and fired shots at the house, striking two persons. (*Herrera, supra*, 70 Cal.App.4th at p. 1461.) As a result of this incident, the defendant was convicted of

(among other things) one count of gang participation and two counts of attempted murder. (*Id.* at p. 1462.)

*Herrera* held that section 654 did not require the trial court to stay the gang participation term, explaining that, " '[M]ultiple punishment . . . may be imposed where the defendant commits two crimes in pursuit of two independent, even if simultaneous, objectives. [Citations.]' [Citation.] [¶] The characteristics of attempted murder and street terrorism are distinguishable . . . . In the attempted murders, *Herrera's* objective was simply a desire to kill. For these convictions, the identities (or gang affiliations) of his intended victims were irrelevant." (*Herrera, supra*, 70 Cal.App.4th at pp. 1466-1467.) After noting there was sufficient evidence to establish the specific intent to kill required for both counts of attempted murder, *Herrera* then stated that under section 186.22, subdivision (a), a defendant:

"must necessarily have the intent and objective to actively participate in a criminal street gang. However, he does not need to have the intent to personally commit the particular felony (e.g., murder, robbery or assault) because the focus of the street terrorism statute is upon the defendant's objective to promote, further or assist the gang in its felonious conduct, irrespective of who actually commits the offense. For example, this subdivision would allow convictions against both the person who pulls the trigger in a drive-by murder *and* the gang member who later conceals the weapon, even though the latter member never had the specific intent to kill. Hence, section 186.22, subdivision (a) requires a separate intent and objective from the underlying felony committed on behalf of the gang. The perpetrator of the underlying crime may thus possess 'two independent, even if simultaneous, objectives[,] thereby precluding application of section 654.'" (*Herrera*, at pp. 1467-1468, fn. omitted.)

*Herrera* also observed that, if section 654 was applied when the gang member was also convicted of the underlying offense, the gang participation statute would be rendered superfluous, and the *Herrera* court did not "believe the Legislature intended to exempt the most culpable parties from the punishment under the street terrorism statutes." (*Herrera, supra*, 70 Cal.App.4th at pp. 1467-1468, fn. omitted.) *Herrera* held that, because there was sufficient evidence the defendant intended to aid his gang in felonious conduct irrespective of his independent objective to murder (*id.* at p. 1468), section 654 did not prohibit multiple sentences. (*Ibid.*)

*Sanchez*

Although *Herrera* was later followed in several other cases,<sup>16</sup> the court in *People v. Vu* (2006) 143 Cal.App.4th 1009 departed from *Herrera*. In *Vu*, the defendant and other members of his gang conspired to kill the victim, and defendant was convicted of (among other things) gang participation and conspiracy to commit murder. (*Vu*, at pp. 1012-1013.) The *Vu* court held that section 654 required the trial court to stay the gang participation term, stating, "*Herrera* is distinguishable because the defendant was charged with a course of criminal conduct involving two gang-related, drive-by shootings in which two people were injured. [Citation.] . . . [¶] Under [*Neal v. State of California* (1960) 55 Cal.2d 11], Vu committed different acts, violating more than one statute, but

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<sup>16</sup> Both *People v. Ferraez, supra*, 112 Cal.App.4th 925 and *In re Jose P., supra*, 106 Cal.App.4th 458 indicated that multiple punishment for gang participation and for the underlying offense is permissible, at least where the underlying offense required a different specific intent. (*Ferraez*, at p. 935 [possession of drugs with the intent to sell]; *Jose P.*, at pp. 470-471 [robbery].)

the acts of conspiracy and street terrorism constituted a criminal course of conduct with a single intent and objective. That single criminal intent or objective was to avenge [a fellow gang member's] killing by conspiring to commit murder. Although that intent or objective could be parsed further into intent to promote the gang and intent to kill, those intents were not independent. Each intent was dependent on, and incident to, the other." (*Vu*, at p. 1034.)

In *Sanchez*, the court again departed from *Herrera*. The *Sanchez* court was unconvinced that *Herrera's* focus on the defendant's culpability,<sup>17</sup> or *Herrera's* examination of the different specific intent requirements for the underlying offense and the gang participation offense, provide adequate reasons for declining to apply section 654 to the sentencing question. (*Sanchez, supra*, 179 Cal.App.4th at p. 1313.) Moreover, *Sanchez* explained "the fact that the defendant had multiple objectives did not necessarily mean that he had multiple *independent* objectives. Section 654 bars multiple punishment *even if* the defendant has ' "multiple criminal objectives," ' as long as those objectives were not 'independent' but 'merely incidental to each other. . . .' [Quoting *People v. Harrison, supra*, 48 Cal.3d at p. 335.] The focus is not on the statutory elements of the

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<sup>17</sup> To the extent the *Herrera* court's concern arose from its belief that the Legislature did not intend "to exempt the most culpable parties from the punishment under the street terrorism statutes" (*Herrera, supra*, 70 Cal.App.4th at p. 1468), that concern has little application when (as here) the defendant's sentence for the underlying offense is enhanced by the term imposed for the section 186.22, subdivision (b)(1), enhancement, because the defendant under those circumstances has not been "exempt[ed] . . . from the punishment under the street terrorism statutes." (*Herrera*, at p. 1468.)

crimes; rather, it is on the *particular* defendant's *actual* intent and objective." (*Id.* at p. 1314.)

*Sanchez* reasoned that a section 654 issue arises only in the context of a defendant who was:

"found guilty of both gang participation and the underlying felony. And to be found guilty of gang participation, the defendant must *either* personally commit the underlying felony, *or* 'willfully promote [ ], further[ ], or assist[ ]' the underlying felony. (. . . § 186.22, subd. (a), italics added.) Thus, *if* the defendant is also found guilty of the underlying offense, the defendant's intent and objective in committing both offenses must be the same. [¶] . . . [¶] This is the point that we find dispositive. Here, the underlying robberies were the act that transformed mere gang membership—which, by itself, is not a crime—into the crime of gang participation. Accordingly, it makes no sense to say that defendant had a different intent and objective in committing the crime of gang participation than he did in committing the robberies. . . . [¶] In our view, the crucial point is that, here, as in *Herrera* and *Vu*, defendant stands convicted of both (1) a crime that requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself. Thus, the most analogous line of cases involves convictions for both felony murder and the underlying felony. It has long been held that section 654 bars multiple punishment under these circumstances." (*Sanchez, supra*, 179 Cal.App.4th at pp. 1314-1315.)

Because *Sanchez* concluded the intentional commission of the underlying crime was essential to both the conviction of the underlying crime and as an element essential to satisfy the gang participation charge, it concluded section 654 precluded multiple punishments because "almost by definition, defendant had to have the same intent and objective in committing all of these crimes." (*Sanchez, supra*, 179 Cal.App.4th at p. 1316.)

### *Resolution*

We agree *Sanchez* is the better reasoned approach for evaluating the application of section 654 to this case. Here the evidence did not suggest that Rodriguez committed the underlying felony of felon in possession of a firearm and, on that same day, also promoted some separate underlying crime in violation of the gang participation statute. To the contrary, the complaint charged that, on August 30, 2005, he actively participated in a street gang and willfully promoted felonious criminal conduct by gang members; the jury was instructed that the felonious criminal conduct could include possession of a handgun within the meaning of section 12021, subdivision (a)(1); and the prosecution argued that possession of the firearm was a felonious act that would qualify Rodriguez for punishment under section 186.22, subdivision (a).

We find the reasoning in *Sanchez* persuasive, and agree that where the underlying felony is a necessary element of the street terrorism charge, section 654 bars separate punishment. Here, the evidence demonstrated Rodriguez possessed the weapon on August 30, and he was charged with the underlying felony offense arising out of this possession. Because the willful commission of the underlying conduct was an essential element to both the underlying offense and to the crime of street terrorism, Rodriguez may not be separately punished for both counts 6 and 7, and we therefore order the term imposed for count 7 stayed under section 654.

### *The Upper Term Argument*

The court imposed the upper term for count 6, and the upper term for the gang enhancement appended to count 6, because the "crime involved great violence, great

bodily harm, and other acts disclosing a high degree of cruelty and viciousness. Also, the defendant was armed with or used a weapon at the time of the commission of the crime."

Rodriguez argues the court abused its discretion in selecting the upper terms because several of the factors cited by the court for selecting the upper terms were not supported by any evidence, and the only fact that was supported by the record (e.g. that Rodriguez was "armed with" a weapon) could not properly be used to impose the upper term.

However, Rodriguez raised no objection at trial, which waives his challenges to the statement of reasons under *People v. Scott* (1994) 9 Cal.4th 331, 353. (See *People v. Brown* (2000) 83 Cal.App.4th 1037, 1041-1042; *People v. de Soto* (1997) 54 Cal.App.4th 1, 7-8 [alleged improper dual use of facts underlying weapons use to impose the upper term waived by failure to raise specific objection at sentencing].) We believe that application of *Scott* here is appropriate because the underlying rationale for requiring timely objections below is that "[r]outine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention." (*Scott*, at p. 353.) Here, the probation report cited numerous factors in aggravation regarding count 6 undoubtedly both proper and supported by the record, and a timely objection would have alerted the court to state alternative reasons for its sentencing choice. Accordingly, we conclude Rodriguez's claim must be deemed waived.

#### DISPOSITION

We affirm the convictions but modify the judgment as follows: The 16-month term imposed on count 7 is ordered stayed pursuant to section 654. The trial court is directed to prepare an amended abstract of judgment consistent with this opinion and

forward it to the Department of Corrections and Rehabilitation, Division of Adult Operations. As modified, the judgment is affirmed.

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McDONALD, J.

WE CONCUR:

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McCONNELL, P. J.

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HALLER, J.